

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
BellSouth Telecommunications, Inc. Request)	
for Declaratory Ruling that State Commissions)	WC Docket No. 03-251
May Not Regulate Broadband Internet Access)	
Services by Requiring BellSouth to Provide)	
Wholesale or Retail Broadband Services to)	
Competitive LEC UNE Voice Customers)	

COMMENTS OF EARTHLINK, INC.

EarthLink, Inc., by its attorneys, hereby files these comments in response to the *Notice of Inquiry* (“NOI”) released in the above-reference docket on March 25, 2005.¹

EarthLink is one of the nation’s leading Internet service providers (“ISPs”) with approximately 5.4 million customers. As a purchaser of DSL services and a provider of retail Voice over Internet Protocol (“VoIP”) services, EarthLink is directly affected by the incumbent local exchange carriers’ (“ILEC”) practice of tying its DSL service to its voice service. The practice both prevents EarthLink from ordering wholesale DSL where the end user is not an ILEC voice customer and diminishes EarthLink’s ability to offer its VoIP services to its customers.

¹ *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Service to Competitive LEC UNE Voice Customers, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd. 6830 (2005).*

The ILEC practice of tying DSL service to local exchange voice service is an unjust and unreasonable practice under Section 201 of the Communications Act² and is both anticompetitive and anti-consumer. Accordingly, EarthLink urges the Federal Communications Commission (“Commission” or “FCC”) to require ILECs to provide DSL service on a stand alone basis in order to create a more competitive marketplace, to further deployment of innovative services such as VoIP, and to protect the public interest. While service bundles can be a competitive and positive reaction to the market as consumers demand simple solutions for their communications needs, discretionary bundling offers to consumers are measurably distinct from the anti-consumer practices of ILECs, which force consumers to purchase services they do not choose and may not want. The Commission should ensure that consumers are allowed to purchase only the services they wish from the ILECs if such services can be offered on a stand alone basis. Indeed, DSL and local voice service are two distinct products; there is no technical reason that a customer must have ILEC local exchange service in order to be served by ILEC DSL.

Notably, ILECs leveraging their market power to force an end user to purchase two products despite the user’s preference for stand alone DSL fits squarely into the definition of an anticompetitive tying arrangement.³ In multiple cases, the Supreme

² 47 U.C.S. §201(b) (2005) (“All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.”).

³ A tying arrangement is “a seller’s agreement to sell one product or service only if the buyer also buys a different product or service.” *Black’s Law Dictionary*, p. 729 (2001). The tying product refers to the product the consumer wishes to purchase (here DSL),

Court has held that tying arrangements similar to the practice at issue here are anticompetitive.⁴ Critically, such anticompetitive activity is also a violation of section 201(b) of the Communications Act.⁵ Specifically, the Commission has held:

Antitrust laws particularly prohibit unlawful tying arrangements in which the seller has enough market power to force a customer to purchase a component of the package that he or she would not otherwise purchase in a competitive market.⁶

while the tied product is the product the consumer is forced to purchase (here local voice service).

⁴ See Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 12 (1984) (holding that an invalid tying arrangement arises where a seller uses its control, or market power, over the tying product to force the buyer into the purchase of a tied product that the buyer did not want to purchase at all or may have preferred to purchase elsewhere); Eastman Kodak Company v. Image Technical Service, Inc., 504 U.S. 451 (1992) (holding same).

⁵ See, e.g., In the Matter of AT&T's Private Payphone Commission Plan, Memorandum Opinion and Order, 7 FCC Rcd 7135, ¶ 3 (1991) (Commission finding that tying violates Section 201(b). "AT&T's bundling of its payphone '0+' commissions with its '1+' service resulted in an anticompetitive impact and, therefore, constituted an unreasonable practice under Section 201(b) of the Communications Act."); In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 8061, ¶ 166, n. 316 (1998)("[S]ection 201(b) remains fully applicable where it is demonstrated that carrier behavior is unreasonable and anticompetitive.").

⁶ In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, Report and Order, 16 FCC Rcd 7418, ¶ 18 (2001) (citing Section 3 of the Clayton Act, 15 U.S.C. § 14. While the FCC allowed continued bundling of telecommunication services and CPE it noted that that "the benefits associated with allowing carriers to bundle products and services at one price do not exist where the provider maintains sufficient market power to require that a customer purchase multiple goods or services in order to obtain one of the components in the package." As explained herein, ILECs have sufficient market power in DSL to force customers to buy the bundled package.); See also In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor To AT&T Corp., Transferee, Memorandum Opinion and Order, 14 FCC Rcd. 3160, n. 350 (1999) (citations omitted) (stating that "when the seller of a tied product has 'appreciable economic power' in the tying product market and the arrangement affects a 'substantial volume of commerce' in the tied market, the arrangement may be anticompetitive, despite any purported consumer benefits or efficiency gains from the arrangement.").

The evidence of ILEC domination in the DSL and broadband markets is replete and is largely based on the FCC's own findings. As the attached EarthLink report, entitled, "The State of the Broadband Duopoly" shows (see Appendix A, hereto), ILECs continue to hold significant market power in broadband and, for that reason, pose a significant anticompetitive risk to the broadband market. EarthLink and others have previously detailed such market power in numerous Commission proceedings as well.⁷

In this case, the ILEC practice of tying DSL with the purchase of local exchange service has *four* pernicious effects on communications markets that are contrary to the public interest and undermine the goals of the Communications Act. *First*, this practice negatively affects the growth of broadband deployment and consumer adoption of broadband services because it prevents ISPs such as EarthLink and others that purchase ILEC wholesale DSL services from offering retail high-speed Internet access service to consumers that choose the local exchange service of a competitive LEC.⁸

Second, this practice also has a deterrent effect for consumers who would otherwise choose a competitive LEC voice service, to the detriment of the Congressional goals of the Telecommunications Act of 1996 to transform the marketplace for local exchange service from a monopoly to one of competition where consumer choice drives

⁷ Comments of EarthLink, Inc., CC Dkt. No. 01-337 (Mar. 1, 2002) at pp. 16-19, 22-25 and Comments of EarthLink, Inc., CC Dkt. 02-33. (May 5, 2003).

⁸ The FCC is directed to ensure the deployment of advanced telecommunications such as broadband, 47 U.S.C. §706 (2005) ("The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . ."). As the Commission has noted, with low-priced DSL services to ISPs, "consumers will ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services." *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237, ¶ 3 (1999).

providers to offer lower prices and better services. Simply put, if consumers must lose their ILEC DSL Service if they choose a competitive local exchange service they will be disinclined to do so.

Third, forcing consumers to buy an ILEC's local exchange service in order to obtain DSL is wholly unnecessary and harms the deployment of new services such as VoIP. The ability of end users to purchase DSL on a stand alone basis is important to the success of VoIP offered over DSL, as well as to competition in the VoIP market. Consumers are far less likely to purchase a competitive VoIP offering if they are required to purchase a redundant ILEC voice service in order to obtain the DSL connection needed for such VoIP services. As such, in order to foster the continued deployment of VoIP, the Commission should ensure that consumers are permitted to choose the type of voice service they wish to purchase, whether from another local provider (CLEC) or from a provider of competitive VoIP services.

Finally, the ILEC's tying practices are also detrimental to the public interest in fostering intermodal competition between wireline and wireless services. Much like VoIP consumers, the consumer who wishes to drop his or her wireline LEC service is also left unable to obtain ILEC-based DSL services when ILECs unreasonably tie DSL to their local voice services. Forcing end users to purchase local voice in order to obtain DSL is both costly to consumers and restricts their ability to choose even their preferred wireless voice services.

Given these significant impacts, it is not appropriate for the Commission to wait any longer on this matter in the hopes that the ILECs will offer stand alone or "naked" DSL voluntarily. With the exception of Qwest, and a few unfulfilled promises, ILECs

have chosen not to offer such products for several years now. Qwest's Stand Alone DSL, first offered in February 2004, demonstrates that there are no technical feasibility barriers to offering stand alone DSL.⁹ No other Bell Operating Company, however, has followed Qwest's lead. While Verizon in April 2005 claimed that it had commenced offering "naked" DSL, the facts show otherwise. The Verizon tariffed service is clearly not "stand alone" DSL – it requires the consumer to be a Verizon LEC customer when first ordering DSL, and maintains this tying requirement (i.e., stating that Verizon will disconnect DSL service) unless the customer switches to an *intermodal* voice competitor.¹⁰ Thus, Verizon continues to tie its DSL with its local exchange service for all new subscribers of DSL-based Internet service, and its offering affirmatively frustrates consumer demand for intramodal VoIP and competitive LEC offerings. Moreover, press reports indicate that Verizon is, in fact, denying consumer requests even for this limited DSL offering.¹¹ After several years of permitting the ILEC industry to engage in this

⁹ Qwest Corporation, Tariff F.C.C. No. 1, § 8.4.1.A.

¹⁰ Verizon Telephone Companies, Tariff F.C.C. No. 20, § 5.1.2.D; Verizon Transmittal No. 560, Tariff F.C.C. Nos. 1 and 20, Description and Justification, at 2-3 (April 15, 2005) ("If an end user with Verizon DSL Service chooses to 'port' his/her local exchange service to a competitive local exchange carrier that does not utilize Verizon's loop facilities, Verizon's tariff requires that the DSL Service be disconnected. With these modifications, Verizon removes the linkage between DSL Service and local exchange service *in this particular circumstance* and enables Verizon to continue to provide DSL Service to a porting end user.") (emphasis added).

¹¹ "Naked DSL: no shoes, no shirt, no service," CNET, at http://reviews.cnet.com/4520-6028_7-6215358-1.html (May 2, 2005) ("So I thought I'd stick with Verizon, and after failing to sign up at its Web site, I called the company up. But I got the same story there, where I used the word *unbundled* instead of *naked* to describe the DSL service it supposedly was offering. The Verizon service rep told me that naked DSL wouldn't happen for another few months . . ."); "Verizon: We Sell Naked DSL," Multichannel News (May 30, 2005) (Despite Verizon's claims that its allegedly "naked" DSL was generally available, "[a] spot check by a reporter who takes Verizon local phone and DSL

anti-consumer tying, it is past time for the FCC to promote competition and put an end to the practice.

For those reasons, EarthLink respectfully urges the Commission to immediately require ILECs to offer DSL on a stand alone basis to ISPs and other end users. Doing so will promote competition in the VoIP market and help curtail anticompetitive and anti-consumer behavior by the ILECs that violates the Communications Act.

Respectfully submitted,

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services in the D.C. market turned up contrary evidence. A Verizon customer-service representative last Wednesday told the reporter that dropping the company's telephone service would require dropping DSL. A Verizon spokesman said naked DSL is an option when switching voice providers not when seeking to drop just Verizon voice service.”).

THE STATE OF THE BROADBAND DUOPOLY

Incumbent LECs continue to hold significant market power in the provision of broadband services due, in large part, to their control over the local access infrastructure (loops, central office space, etc.) and their anticompetitive practices in provisioning wholesale DSL services to competitive ISPs. For example:

- “The record indicates that no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market.” *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order*, 18 FCC Rcd. 16978, ¶ 233 (2003), *partially vacated on other grounds*, USTA v. FCC, 359 F.3d 554 (2004) (“TRO”).
- According to FCC data, fixed wireless and satellite hold insufficient market share (just 1.3%) to be considered serious competition to the incumbent LEC or cable operator in any relevant market.¹
- Broadband over power lines (“BPL”) is not a significant entrant in either retail or wholesale markets.² In a May 2004 survey of alternative broadband services, Verizon was able to list only two commercial roll-outs of BPL, at least one of which was not in Verizon territory.³

¹ High-Speed Services for Internet Access: Status as of December 31, 2004, Chart 2 – High-Speed Lines by Technology (rel. December 22, 2004) (“*FCC December 2004 High-Speed Report*”); *see also*, *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order*, 18 FCC Rcd. 16978, ¶ 231 (2003), (“TRO”), *partially vacated and remanded*, USTA v. FCC, 359 F.3d 554 (D.C. Cir. 2004)(“The record indicates that, at present, fixed wireless and satellite services remain nascent technologies, with limited availability, when used to provide broadband services to the mass market.”).

² TRO, ¶ 232 (“Finally, we note that other technologies that can substitute for loops in providing narrowband and broadband service are currently under development. For example, some companies are experimenting with delivering narrowband voice service via power lines. Such technologies have not been deployed beyond an experimental basis (e.g., technical trials) at this time.”)(footnote omitted).

³ “Competition in the Provision of Voice Over IP and Other IP-Enabled Services,” CC Dkt. No. 04-36, at A-13 (filed May 28, 2004) (referencing BPL roll-outs in Virginia and Ohio).

Appendix A: *The State of the Broadband Duopoly*

Even if retail cable modem services were included in the relevant market for wholesale broadband transport (which they should not be) and/or providers of retail cable modem services were considered participants in the relevant wholesale broadband transport market (which would also be incorrect), the market still would not be competitive. Rather, the market so defined is at best a duopoly in which each duopolist holds market power.⁴

- For “a typical local broadband market, the HHI ranges between approximately 5000 and 5400. The above figures indicate that the typical broadband internet market is very highly concentrated.”⁵

⁴ “In a duopoly, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger.” *FTC v. H.J. Heintz*, 246 F.3d 708, 724 (D.C. Cir. 2001); *In the Matter of Application of Echostar Communications Corp.*, Hearing Designation Order, 17 FCC Rcd. 20559, ¶ 100 (“courts have generally condemned mergers that result in duopoly”), ¶ 103 (“existing antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality”) (2002); United States Dept. of Justice Antitrust Div. and Federal Trade Commission, *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. 41552, § 0.1 (1992) (“*Merger Guidelines*”)(“where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist . . .”). The Commission has held that “both economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market.” *In the Matter of 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620, ¶ 289 (2003); *see, In the Matter of Personal Communications Industry Ass’n*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶¶ 22, 23 (1998) (declining to find the CMRS marketplace sufficiently competitive where some of six potential competitive PCS licensees may not have begun to offer service).

⁵ *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd. 6722, ¶ 123 (2003). The Herfindahl-Hirschman Index, or HHI, a well-accepted measure of market concentration used by the U.S. Department of Justice and the Federal Trade Commission, is described at Section 1.5 of the *Merger Guidelines*. The HHI score is the sum of the squares of the market shares of each platform. The index divides the spectrum of market concentration into three categories: “unconcentrated” for markets with an HHI of less than 1,000; “moderately concentrated” for markets with HHI between 1,000 and 1,800;

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- Commission statistics show that 13.8% of U.S. zip codes are served by (*i.e.* receive at least a single high-speed line over any technology at any price and any quality level) just one provider and another 16.8% are served by just two providers.⁶
- As of June 30, 2004, ADSL and cable accounted for 92.4% of all high-speed lines in the U.S. and for 97.5% of all high speed lines in the residential and small business market.⁷ As of June 30, 2004, incumbent LECs have a 95.0% market share of ADSL lines.⁸
- In many states in the United States, monopoly or duopoly market power persists throughout the state. For example, according to FCC data, *eighteen states* have 40% or more of the zip code areas served by just one or two providers.⁹ It should be kept in mind that this percentage represents only the number of zip codes in a state with at least one high-speed line in service at any price, over any technology, at any level of quality. Accordingly, they likely overstate the level of competition (understate the extent of monopoly and duopoly market power) by including zip codes where one or more providers provides very few if any lines that are comparable in speed, price, or quality to the SBC-ASI DSL service.

Even where the monopoly has been reduced to a duopoly, incumbent LECs like Verizon are a significant player:

and “highly concentrated” for markets with an HHI above 1,800. *Merger Guidelines*, § 1.5. We note that the FCC data does not include non-incumbent LEC ADSL on a state-by-state basis. However, if included, it would be unlikely to change the HHI analysis in any significant way since non-incumbent LEC ADSL comprises only 4.7% of ADSL nationally. In fact, on a national level, with 4.7% non-incumbent LEC ADSL, 33.5% incumbent LEC DSL, 57.3% cable, and 7.6% “other,” the HHI is 4,485, which is still a very highly concentrated market. *FCC December 2004 High-Speed Report*, Table 5 – High-Speed Lines by Type of Provider as of June 30, 2004.

⁶ *FCC December 2004 High-Speed Report*, Table 12 – Percentage of Zip Codes with High-Speed Lines in Service.

⁷ *FCC December 2004 High-Speed Report*, Table 1 – High Speed Lines and Table 3 – Residential and Small Business High Speed Lines.

⁸ *FCC December 2004 High-Speed Report*, Table 5 – High-Speed Lines by Type of Provider as of June 30, 2004.

⁹ *FCC December 2004 High-Speed Report*, Table 13 – Percentage of Zip Codes with High-Speed Lines in Service as of June 30, 2004 (states are: Alaska, Arkansas, Hawaii, Idaho, Iowa, Kentucky, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Vermont, and West Virginia.)

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- The Pew Internet & American Life Project confirms that “DSL now has a 42% share of the home broadband market” compared with cable’s 54% share. According to the Pew Study, fixed-satellite and wireless providers captured just 3% of the market. The Pew Study also confirms the FCC data that 17% of consumers are served by just one last mile broadband provider.¹⁰ Thus, incumbent LECs, including Verizon, are now roughly equal partners in the broadband duopoly/monopoly.
- According to the FCC, ADSL leads cable in several states. For example, SBC’s ADSL in California leads cable in market share: ADSL has 50.0% and cable has 41.1% of the market for high-speed lines.¹¹ In addition, the FCC’s data shows that ADSL deployment leads cable modem deployment in the BellSouth state of Georgia by almost 10%.¹²

Moreover, while the Commission’s precedent suggests that the relevant geographic market is local,¹³ the FCC’s data cited above shows that the state of broadband competition varies widely from one locality to another. Indeed, in the Commission’s still on-going proceeding addressing the appropriate regulatory classification for wireline broadband services, the State of California and the California Public Utilities Commission entered into the record the following findings:

¹⁰ Pew Internet Project Data Memo, at 2 and 6 (April 2004), *found at* http://www.pewinternet.org/pdfs/PIP_Broadband04.DataMemo.pdf.

¹¹ *FCC December 2004 High-Speed Report*, Table 7 – High-Speed Lines By Technology as of June 30, 2004.

¹² *FCC December 2004 High-Speed Report*, Table 7 – High-Speed Lines By Technology as of June 30, 2004. ADSL also leads cable in the states of Montana, North Dakota, and South Dakota. *Id.*

¹³ *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee, Memorandum Opinion and Order*, 16 FCC Rcd. 6547, ¶ 74 (2001) (“[t]he relevant geographic markets for residential high-speed Internet access services are local”).

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- “In California, SBC, and other incumbent LECs, continue to be the sole providers of broadband transmission service to nearly half of all residential customers in the state who have access to broadband service.”¹⁴
- “California does not believe that the current state of intermodal broadband competition can be described as effective, price constraining competition. At best, there currently is a duopoly of the incumbent LEC and the cable modem provider. But for many customers, *i.e.*, residential customers who do not have access to cable broadband and the majority of small and medium sized business customers, the incumbent LEC is the sole provider of broadband services. As a result of active regulatory actions in California, competitive LECs were able to provide DSL services in California earlier than elsewhere. However, in the last two years, much of that competition has evaporated as competitors offering DSL services in competition with the incumbent LEC have exited the market. While there were three major wholesale providers of DSL service in competition with Pacific Bell/SBC in 1997, currently only one major non-ILEC provides DSL service in California, and SBC/Pacific owns equity in that company.”¹⁵
- “Forty-five percent of California’s population with broadband access (including vast majority of San Francisco, San Jose, Long Beach, Oakland, and Stockton) can only get DSL service and cannot get cable modem service.”¹⁶
- “According to an internal study by the CPUC staff, 35% of Californians live in communities where DSL is the only broadband service choice, while 21% of Californians live in communities that have neither cable modem nor DSL service. Only 30% of the state’s population live in communities where both DSL and cable modem services are available. Because of DSL’s lower upgrade cost and faster upgrade time frames, incumbent LECs may continue to dominate in providing broadband services in California.”¹⁷
- “Currently, one of three California residents live in areas where DSL service is the sole means of gaining broadband transport to an ISP. The incumbent LECs are the dominant, and in many cases, the exclusive provider of broadband service in California. Certain customers in discrete metropolitan areas may also obtain transport to the Internet from cable operators via a cable

¹⁴ Reply Comments of the People of the State of California and the California Public Utilities Commission, CC Docket Nos. 02-33, 95-20, 98-10, at 2 (filed July 1, 2002).

¹⁵ Reply Comments of the State of California and the California Public Utilities Commission, CC Dkt. 01-337 at 12 (filed April 22, 2002) (footnotes omitted).

¹⁶ *Id.* at 17.

¹⁷ *Id.*, at 14-15. *See also, id.*, Appendix A (pie chart of DSL, cable and other in California).

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modem transmission service over cable facilities; however, in California, primarily because of the substantial cost in upgrading cable facilities to provide cable modem service, such service is limited to certain suburban areas with spotty coverage in downtown urban areas. Other transport methods of accessing the Internet use wireless, broadcast, and unlicensed spectrum technologies. These technologies for transport to the Internet, however, are not widely available to California customers as a viable alternative to either DSL service or cable modem service.”¹⁸

California is not an isolated case. BellSouth’s market power is a matter of adjudicated fact by two state public service commissions. Specifically, in November 2003, the Georgia Public Service Commission found that “BellSouth possesses market power in Georgia’s high speed internet market,”¹⁹ due in part to the finding that “BellSouth’s [market] power in having an overwhelming majority of DSL lines in Georgia is greater than it would be if DSL was not expanding its lead over cable in the relevant market.”²⁰ Similarly, in December 2002, the Louisiana Public Service Commission found that BellSouth was the dominant DSL provider in the state.²¹

Further, even if one were to move the scope of the analysis from a local geographic market and conduct an HHI analysis using FCC data on either a national or state-by-state basis, the broadband market (which includes all broadband lines, regardless of whether they are offered at wholesale to independent ISPs) is currently far more concentrated than a market with an HHI score of 1,800, which is the score the Department of Justice considers indicative of a “highly concentrated” market:

¹⁸ Comments of California, CC Dkt. 02-33 at 5-6 (filed May 3, 2002).

¹⁹ *Petition of MCI Metro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration*, Georgia Public Service Commission, Order on Complaint, Docket No. 11901-U, at 6 (Nov. 13, 2003).

²⁰ *Id.*, at 14.

²¹ *In re: BellSouth’s Provision of ADSL Service to End-users over CLEC Loops*, Louisiana Public Service Commission, Order R-26173, at 7 (Dec. 18, 2002).

**HHI ANALYSIS OF THE STATE-BY-STATE BROADBAND MARKET
USING FCC DATA**

State	ADSL (%)	Cable (%)	Other (%)	HHI
Nationwide	35.1	57.3	7.6	4,572.1
Alabama	32.0	58.8	9.2	4,564.0
Alaska	23.5	*	*	Not known
Arizona	17.4	73.5	9.1	5,784.2
Arkansas	43.0	50.7	6.3	4,457.1
California	49.9	41.1	9.0	4,261.0
Colorado	38.6	53.8	7.6	4,443.4
Connecticut	39.2	57.5	3.3	4,854.8
Delaware	*	*	*	Not known
District of Columbia	46.0	*	*	Not known
Florida	41.1	51.9	7.0	4,430.9
Georgia	50.4	38.3	11.3	4,136.1
Guam	*	*	*	Not known
Hawaii	*	*	*	Not known
Idaho	35.2	*	*	Not known
Illinois	45.1	45.1	9.7	4,168.1
Indiana	34.6	58.7	6.7	4,688.0
Iowa	28.5	65.8	5.6	5,180.4
Kansas	27.3	64.7	8.0	4,999.4
Kentucky	39.8	51.4	8.8	4,304.2
Louisiana	32.4	61.2	6.4	4,831.2
Maine	25.4	*	*	Not known
Maryland	28.8	64.9	6.3	5,079.9
Massachusetts	24.7	68.8	6.5	5,386.7
Michigan	24.7	68.7	6.6	5,374.9
Minnesota	28.0	63.2	8.8	4,855.7
Mississippi	37.8	51.6	10.6	4,206.3
Missouri	43.1	49.1	7.9	4,323.5
Montana	49.0	39.6	11.4	4,100.4
Nebraska	17.7	71.5	10.8	5,545.7
Nevada	25.7	*	*	Not known
New Hampshire	18.9	76.5	4.6	6,230.5
New Jersey	24.3	69.5	6.2	5,461.6
New Mexico	44.3	48.7	7.0	4,385.3
New York	21.8	71.1	7.1	5,580.8
North Carolina	27.3	64.5	8.1	4,975.4

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State	ADSL (%)	Cable (%)	Other (%)	HHI
North Dakota	49.4	36.7	13.8	3,984.1
Ohio	31.9	61.3	6.8	4,816.3
Oklahoma	38.7	*	*	Not known
Oregon	32.4	59.7	7.8	4,681.3
Pennsylvania	244.6	510.8	50.0	323,221.3
Puerto Rico	*	*	*	Not known
Rhode Island	*	*	3.5	Not known
South Carolina	27.2	64.4	8.4	4,961.7
South Dakota	44.8	35.6	19.6	3,656.6
Tennessee	27.6	63.6	8.8	4,885.3
Texas	41.4	51.8	6.8	4,441.6
Utah	48.2	*	*	Not known
Vermont	40.2	*	*	Not known
Virgin Islands	*	*	*	Not known
Virginia	23.6	69.6	6.9	5,441.0
Washington	38.8	55.0	6.2	4,572.5
West Virginia	*	76.6	*	Not known
Wisconsin	28.2	65.7	6.2	5,143.0
Wyoming	38.1	*	*	Not known

* Data withheld by FCC to maintain firm confidentiality